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In The

Supreme Court of the United States

October Term, 1969

No. 1201

GEORGE WILLIAM CROCKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The decision of the United States District Court for the District of Minnesota, (Neville, J.) is reported at 294 F. Supp. 776. The decision of the United States Court of Appeals for the Eighth Circuit (Heaney, J.) is as yet not reported. Both opinions are reprinted in Appendix A hereof.

JURISDICTION

Motion in arrest of judgment was denied in the District Court on January 16, 1969, and final judgment and sentence were entered March 18, 1969. Denial of motion in arrest of judgment and final judgment were affirmed in the Circuit Court on January 8, 1970. This Court has jurisdiction under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Is the Military Selective Service Act of 1967 null and void under Article I, Section 8, Clauses 12, 15, 16 and 18; Article I, Section 10, Clause 3, and Amendment II of the Constitution of the United States?

2. Is the Military Selective Service Act of 1967 unconstitutional in that it is not a "proper" means to "raise armies" and circumvents the constitutional processes for "calling forth the militia"?

3. Were *Selective Draft Law Cases*, 245 U.S. 366 (1918), decided on the basis of false historical and legal premises?

4. Does reason compel this Court to review the issues of this case in light of the following observations below by the United States Court of Appeals for the Eighth Circuit?

(1) The reasons advanced by petitioner for overturning the *Selective Draft Law Cases*, *supra*, are "serious and thoughtful."

(2) The argument in this case advanced against the constitutionality of direct federal conscription "was not advanced when the question was first decided."

(3) A circuit court may not overrule the decisions of this Court.

CONSTITUTIONAL PROVISIONS

The provisions of the *Constitution of the United States* here pertinent are Article I, Section 8, Clauses 12, 15, 16 and 18; Article I, Section 10, Clause 3, and Amendment II, which read as follows:

Article I, Section 8:

"Congress shall have power . . .

"To raise and support Armies, but no appropriation of money to that use shall be for a longer term than two years; . . . (Clause 12)

"To provide for calling forth the Militia to execute laws of the Union, suppress insurrections, and repel invasions; (Clause 15)

"To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the Militia according to the discipline prescribed by Congress; . . . (Clause 16)

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . (Clause 18)

Article I, Section 10 of the *Constitution* provides in pertinent part:

"No State shall, without the consent of Congress, . . . keep troops and ships of war in time of peace, . . . or engage in war, unless actually invaded or in such imminent danger as will not admit of delay." (Clause 3)

Amendment II provides:

"A well regulated Militia being necessary to the security of a free State, the right of the People to keep and bear arms shall not be infringed."

STATUTORY PROVISIONS

The statute here in question is the Military Selective Service Act of 1967, 50 App. *U.S.C.*, Section 451, *et seq.*, in its entirety. While the entire statute is here brought into question, only the provisions most directly pertinent are set out in Appendix B hereof, namely, parts of 50 App. *U.S.C.*, Sections 451 and 454.

STATEMENT OF THE CASE

Petitioner, a Quaker, was convicted for refusal to report for and submit to induction contrary to the Military Selective Service Act of 1967. Petitioner refused to apply for conscientious objector status: he believes that any kind of cooperation with the Selective Service System is morally and legally wrong.

At trial on November 27, 1968, in the District Court, it was shown that petitioner was in due course classified 1-A, ordered to report for induction and refused induction. It was further established by evidence specifically admitted to raise the question of the constitutionality of the Draft Act, that the Draft Act is administered by professional soldiers commissioned to the President; that petitioner was ordered against his wishes into the "Army of the United States" under the Draft Act; that while one is part of the "Army," he is subject to orders and training by professional soldiers commissioned by the President and may be used in any part of the world for any military purpose.

Upon conviction by jury, petitioner filed a timely motion in arrest of judgment urging that the Draft Act is unconstitutional in that it is not a "proper" means to "raise armies" and circumvents the constitutional processes for "calling forth the militia." The motion was denied on January 16, 1969. Petitioner was sentenced to four years in prison on March 18, 1969. From the denial of the motion in arrest of judgment and from final judgment and sentence petitioner appealed. The Circuit Court affirmed on January 8, 1970.

REASONS FOR GRANTING THE WRIT

A. Introduction.

Certiorari should be granted because the Military Selective Service Act of 1967 rests on *Selective Draft Law Cases*, 245 U.S. 366 (1918), which held that Congress has the constitutional power to "raise armies" by conscription and that case was wrongly decided: a new evaluation thereof is necessary in light of crucial historical information overlooked, misunderstood, or ignored by the Court more than fifty years ago.

Since *Selective Draft Law Cases, supra*, were decided under a formal declaration of war, it has been argued that the question of constitutionality of peace-time conscription is an open question. *Holmes v. United States*, 391 U.S. 936 (1968). Cf. *Congressional Record*, August 23, 1940, *Appendix* (Hon. Burton K. Wheeler of Montana). This position has consistently been rejected by this and other federal courts. See e.g., *Holmes v. United States, supra*; *Ashton v. United States*, 404 F.2d 95 (8th Cir. 1968). And we think rightly so. *We do not contend that the draft is "unconstitutional in time of peace."* See Heaney, J., *United States v. Crocker*, ... F.2d ..... (8 Cir. 1970). That contention presupposes the power of Congress to "raise armies" by conscription. The Constitution makes no distinction between war and peace insofar as the power to "raise armies" is concerned. And we are certain that the Framers intended Congress to have the power to "raise armies" in time of peace. See e.g., Hamilton, *The Federalist*, No. 24; 1 Stat. L. 119 (1790).

We make a considerably different argument, summarized by Judge Heaney of the 8th Circuit in this case below, as follows:

"Primarily, the appellant (petitioner) argues that the Act is unconstitutional under Article I, Section 8, Clauses 12, 15, 16, and 18; Article I, Section 10, Clause 3; and Amendment II of the United States Constitution.

"He argues that, according to the Framers of the Constitution, the precise meaning of the word 'armies' refers to professional troops, and that the meaning of 'militia' refers to citizen troops, including everyone *compelled* to render military service. He argues that, on the basis of these precise meanings: (1) Congress has no power to conscript 'armies'; (2) Congress may compel military service only by 'calling forth the militia'; and (3) the Military Selective Service Act of 1967 is not a 'proper' means of 'raising armies,' and it circumvents the constitutional processes for 'calling forth the militia.'". *United States v. Crocker, supra,* ..... F.2d at .....

B. General Points of Jurisprudence and History.

Referring to the foregoing argument, which we ask this Court to consider, the 8th Circuit (per Heaney, J., for himself, Matthes, J., and Van Oosterhout, C. J.) noted:

"The appellant (petitioner here) argues that the precise meaning of the 'armies' and 'militia,' as used by the Framers of the Constitution, was misconstrued by the Court in *Selective Draft Law Cases, supra,* perhaps because the argument advanced here, based on constitutional history, was not advanced when the question was first decided.

"The reasons advanced by the appellant (petitioner here) for overturning the decisions of the Supreme Court are serious and thoughtful. But, we cannot overturn the decisions of the Supreme Court here." *United States v. Crocker, supra,* ..... F.2d at .....

We are fully sympathetic with the foregoing observations. This Court must resolve the grave doubts as to the constitutionality of the Military Selective Service Act of 1967 now

publicly acknowledged by the United States Court of Appeals for the Eighth Circuit.

Selective Draft Law Cases, supra, upon which all subsequent precedents to the same effect rely, were based on this historical assumption:

> "The compulsory draft was a normal method of raising armies in 1787 when the Constitution was adopted." *Selective Draft Law Cases, supra,* 245 U.S. at 369 (Government's Brief), and at 377-378 (Court's Opinion).

The truth of the matter was recently stated by Edward S. Corwin as follows:

> "The only type of standing army known to the Framers was a mercenary, volunteer force, and the only compulsory type of service known to them was service in the militia which was confined to local and limited purposes as it had been in medieval England, and still is in Clause 15 (of Article I, Section 8 of *The Constitution of the United States*)." Corwin, *The Constitution and What It Means Today,* Antheneum, New York, 1965, p. 71. Cf. *Dictionary of American History,* Chas. Scribner's Sons, New York, Vol. I, p. 112 ff. (under "Army of the United States"), and Vol. III, p. 402 (under "Militia"); *Oxford Universal Dictionary,* p. 99 (under "Army") and p. 1250 (under "Militia").

This historical fact was not called to the attention of or was overlooked by the Court in 1918 when *Selective Draft Law Cases, supra,* were decided. After several years of research and on the basis of very great quantities of historical evidence, we have come to the inescapable conclusions: (1) That the word "armies" was used by the Framers as a legal term of art specifically meaning *professional* troops; (2) that the power to "raise armies" was intended by the Framers to be the power of *hiring* or *enlisting* professional soldiers; (3) that the word "militia" was used by the Framers as a legal term of art specifically meaning *citizen* soldiers, including all *compelled* to render military service;

and (4) that the Framers intended the power of "calling for the militia" to be the power of compelling citizens to render military service to "execute laws of the Union, suppress insurrections and repel invasions." We are pleased to acknowledge that Leon Friedman, Esq., of New York has reached very similar conclusions through research apparently concurrent with but independent of ours. See Mr. Friedman's excellent article *Conscription and the Constitution: The Original Understanding*, 67 Mich. L. Rev. 1493 (1969). It should be noted that during the Civil War the same conclusions were reached by Chief Justice Roger B. Taney of this Court. *Thoughts on the Conscription Law of the U. States—Rough Draft Requiring Revision*, reprinted in *18 Tyler's Quarterly Historical & Genealogical Magazine*, 72 (1936), and cited by Douglas, J. in *Holmes v. United States, supra*, 391 U.S. 945-946 (Footnote 8). *Cf. Kneedler v. Lane*, 45 Pa. St. 238 (1963-1964).

It should be emphasized that *we are not asking this Court to consider here a claim that all compulsory military service is illegal;* We simply maintain that the "militia" provisions of the *Constitution* set out certain rational limits on use and organization of citizen soldiers that would prohibit, for example, a drafted foreign legion, but may allow compulsory duty in case of serious domestic violence or armed attack on our shores.

C. Historical Errors and Misconceptions in Selective Draft Law Cases.

Of course, we cannot here argue the full merits of our position that the current draft act is not a "proper" means to "raise armies" and circumvents the constitutional processes for "calling forth the militia." Yet, moved by that sense of good faith essential to a successful adversary system, we recognize that this Court is entitled to a *prima*

facie showing that it really can be demonstrated what the Framers meant by the words "armies" and "militia." Our briefs to the district and circuit courts are sufficient for that purpose, and we include hereunder in this petition a few illustrative examples from the mountain of available evidence which historically describes the constitutional distinction between "armies" and "militia": thereby, we earnestly hope, this Court will be able to witness for itself important portions of the testimony of the Framers relative to this all-important subject of compulsory military service, which at present is rocking the very foundation of this Republic—and egregious errors in *Selective Draft Law Cases, supra,* upon which the current draft system is based.

The Court tried to make much of the fact that the power of compulsory military service existed in England prior to the American Revolution. *Selective Draft Law Cases, supra,* 245 U.S. at 378-379. The Court failed to acknowledge, however, that Englishmen thought of compulsory service as service in the "militia": indeed, during Queen Anne's reign—in 1704 and again in 1707—the British Parliament twice rejected as unconstitutional proposals to conscript "armies". See *e.g., Kneedler v. Lane, supra,* 45 Pa. St. at 254-255 (Woodward, J.).

It has been argued that George Washington favored conscript "armies." *Kneedler v. Lane, supra,* 45 Pa. St. at 287 (Read, J.). In truth, however, Washington favored conscription to raise "Militia" made up of citizens to guard against "mercenary Armies." Washington, *Sentiments on a Peace Establishment* (1783), reprinted in Commins, *Basic Writings of George Washington,* Random House, New York (hereafter cited *Commins*), p. 468 ff. at pp. 479-480. Referring to conscription, Washington wrote:

> "It may be laid down to a primary position, and the basis of our system, that every *Citizen* who enjoys the pro-

> tection of a free government, owes not only a proportion of his property, but even of personal services to the defence of it, and consequently that the *Citizens* of America (with a few legal and official exceptions) from 18 to 50 years of age should be borne on the *Militia* rolls . . . ." (Emphasis added.) *Commins*, p. 480.

These words were not discovered by historians until more than a decade after *Selective Draft Law Cases, supra,* were decided. As to further views of Washington and his Secretary of War, Henry Knox, see *Annals of Congress*, Vol. 1, col. 1076, *et seq.*, and Vol. 2, col. 2087, *et seq.*

In *Selective Draft Law Cases, supra,* it was argued with the full endorsement of the Court that the history of the Philadelphia Convention of 1787 shows the Framers definitely did not intend to limit "armies" to "voluntary enlistments." *Selective Draft Law Cases, supra,* 245 U.S. at 369. Again, quite the contrary is the case: James Madison's *Notes on Debates in the Federal Convention of 1787* (cited hereafter, *Notes*), reproduced in *Documents Illustrative of the Formation of the Union of American States*, United States Government Printing Office, Washington, D.C., 1927 (cited hereafter, *Documents*), pp. 109-745, contain instance after instance showing that "armies" were thought of as professional troops and that "militia" were thought of as citizen troops. As just one example, we point to George Mason of Virginia proposing that the clause giving Congress the power "to provide for organizing, arming and disciplining the Militia, etc." (Article I, Section 8, Clause 16), be given a prefatory amendment reading: "And that the liberties of the people may better be secured against the danger of Standing Armies in time of peace." The thrust and purpose of the proposal was to emphasize the notion that the citizen "militia" was to protect the general citizenry from professional "armies." The principle of the

proposal was acceptable, but it was voted down because, as Gouverneur Morris of Pennsylvania put it, ". . . it would put a dishonorable mark of distinction on the military class of citizens." *Notes,* September 14, 1787; *Documents,* p. 725. Here we find the "army" referred to as the "military class" of the country—in other words as the professional military.

It has been argued that since Hamilton said the power to "raise armies" should exist "without limitation," *The Federalist,* No. 23, 4th paragraph, and, since the Framers well knew of conscription, the power to "raise armies" was intended by the Framers to include the power to conscript. See *e.g., Selective Draft Law Cases, supra,* 245 U.S. at 370 (Government's Brief) and at 377-378 (White, C.J.); *Kneedler v. Lane, supra,* 45 P. St. at 283-284 (Read, J.).

But in truth Hamilton thought of "armies" as professional troops: He believed the power to hire *professional soldiers* should exist without limitation, largely because of his deep dislike of conscription or service in the "militia." Hamilton, *The Federalist,* Nos. 24, 29. Thomas Jefferson favored a constitutional prohibition of "armies" in time of peace, because professional troops are dangerous to civilian government. Jefferson's letters to Madison for December 20, 1787, and July 31, 1788, reproduced in *Life and Selected Writings of Thomas Jefferson,* Random House, New York (hereafter cited *Jefferson*), p. 436 ff. and p. 450 ff. Hamilton's argument against such a constitutional prohibition was that if peace-time military duty could not be done by "armies" it would have to be done by "militia," and that would entail conscription, the most hated evil of all. To quote Hamilton himself:

> "Previous to the revolution and ever since the peace there has been a constant necessity for keeping small garrisons on our western frontier. . . . These garrisons must *either be furnished by occasional detachments from the Militia or by permanent corps in the pay of*

the Government. The first is impracticable, and if practicable, would be pernicious. The *Militia* would not long, if at all, *submit* to being *dragged* from their occupations to perform that most disagreeable duty in times of profound peace. And, if they could be *prevailed upon or compelled to do it,* the increased expense of a frequent rotation of service, and the loss of labor and disconcertation of industrious pursuits of individuals would form conclusive objections to the scheme. It would be as burdensome and injurious to the public as well as to private *Citizens.* The latter resource of *permanent corps in the pay of the Government amounts to a Standing Army* in time of peace." (Emphasis added.) Hamilton, *The Federalist,* No. 24, 11th paragraph.

As to further views of Jefferson and Hamilton on Compulsory military service—"Militia" service, see, for example: Jefferson's letter to Kusciusko, February 10, 1810, reproduced in *Jefferson,* p. 600 ff.; Hamilton, *The Federalist,* No. 29.

In *Selective Draft Law Cases, supra,* no reference was made to the Second Amendment. Had the Court looked into this provision, it would have discovered crucial material showing that the Framers defined the "militia" as "the body of the people capable of bearing arms"; that the Framers thought of compulsory military service as service in the "militia" exclusively; and that the Framers intended the Amendment primarily as a safeguard to protect the "militia" made up of citizens, from "armies" made up of professional soldiers. See, *e.g., Annals of Congress,* Vol. 1, cols. 434, 749, *et seq.,* 467, *et seq.; Patterson,* pp. 86-89, 111, 181-182, 196-197; *Documents,* pp. 1030, 1047, 1055. An interesting example of such material is one of James Madison's proposals for amendment made in the House of Representatives on June 8, 1789, which read as follows:

"The right of the *People* to keep and bear arms shall not be infringed; a well-regulated *Militia* being the best

security to a free country; but, no person religiously scrupulous of bearing arms shall be *compelled* to bear arms." *Annals of Congress,* Vol. 1, Col. 434; *Patterson,* p. 111.

It has been argued that the "rejection" of the "proposals" of the Rhode Island Constitutional Convention of 1790 to limit compulsory military service shows that the Framers thought Congress could "raise armies" by conscription. *Selective Draft Law Cases, supra,* 245 U.S. at 369-370 (Government's Brief); *Kneedler v. Lane, supra,* 45 Pa. St. at 287 (Read, J.). Detailed analysis, too lengthy for purposes of this petition, reveals the truth of the matter to be quite different. One of the "proposals" was in fact a "declaration" of the natural, inalienable right of religious conscientious objection to "*militia*" service. The other, which was neither "accepted" nor "rejected," concerned the *deployment* of conscripted "militia" from one state to another—not the means of *raising* "armies." *Documents,* pp. 1055, 1057. *Cf., Documents,* pp. 1030, 1032, 1034-1035, 1047, 1049; Elliot, *Debates,* J. P. Lippencott & Co., Philadelphia, 1891, Vol. II, p. 552; Hamilton, *The Federalist,* No. 29, 11th, 12th and 13th paragraphs; *Annals of Congress,* Vol. 1, cols. 434, 749, *et seq.,* and 767, *et seq.;* Patterson, *The Forgotten Ninth Amendment,* Bobbs-Merrill, Indianapolis (hereafter cited *Patterson*), pp. 87-89, 111, 181-182, 196-197.

It has been argued that the Madison Administration proposed a bill to conscript "armies" during the war of 1812. *Selective Draft Law Cases, supra,* 245 U.S. at 285 (White, C.J.). The bill in question was, in fact, a bill to "call forth the militia" to supplement the ranks of the "army" in order to "repel invasions" and was defeated largely on constitutional grounds. See *e.g., Annals of Congress,* Vol. 28, col. 70, *et seq.* (Hon. David Daggett of Connecticut); Schlissel, *Conscience in America,* E. P. Dutton Co., Inc., New York,

1968, p. 64 ff. (Hon. Daniel Webster of New Hampshire); Leach, *Conscription in the United States: Historical Background*, Chas. E. Tuttle Pub. Co., Rutland, Vt., 1952, Chs. III, IV, V, VI and VII.

D. Errors of General Argument in Selective Draft Law Cases.

Several general arguments made by the Court in *Selective Draft Law Cases, supra*, are manifestly erroneous and historically inaccurate.

The Court argued that unless Congress had the power to conscript, there would be an "Army without men to compose it."* *Selective Draft Law Cases, supra*, 245 U.S. at 377 (White, C. J.). That argument overlooks the power to "raise armies" by enlistment, which was the only way "armies" were raised when the Constitution was adopted. See, *e.g.*, 1 Stat. L. 119 (1790). The Court countered, however, that raising "armies" by "enlistments" is "in no substantial sense a power." *Selective Draft Law Cases, supra*, 245 U.S. at 378 (White, C.J.). Not only is that position abstractly nonsenical, but it ignores the fact that the power to "raise armies"—to hire professional troops directly—was thought by the Framers to be a very substantial power, the propriety of which was much debated during the years of constitutional adoption; did not exist under the *Articles of Confederation;* and was one of the central points of controversy during the English Revolution of 1688. *Articles of Confederation*, Articles II, VII and IX; Hamilton, *The Federalist*, No. 22, 5th paragraph, No. 24, and No. 26, 4th paragraph.

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*"As the mind cannot conceive an Army without men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice." 245 U.S. at 377.

The Court said that the power of "calling forth the militia" is subordinate to, yet separate from, the power to "raise armies"; in other words, that Congress may draft the "militia" directly into the "army" and treat the soldiers thus raised as part of the "army" free from constitutional limitations on the use and organization of the "militia." *Selective Draft Law Cases, supra,* 245 U.S. at 381-383 (White, C.J.). Yet, if that holds, Congress may at will circumvent all of the intricate limitations on the use and organization of the "militia"; and the "militia" clauses, the lengthiest in the Constitution, are "the idlest words ever written." *Cf., Kneedler v. Lane, supra,* 45 Pa. St. at 256-257 (Woodward, J.). Once Congress appropriates funds, under Article I, Section 8, Clause 12, "Armies" are under the complete control of the President and may be used anywhere in the world for any military purpose. On the other hand, Article I, Section 8, Clauses 15-16, impose important limitations on the use of the "militia" and carefully divide authority over the "militia" between the state and federal governments. Moreover, the notion that Congress may draft "militia" directly into the "army" ignores the legislative history of Article I, Section 8, Clause 16, and Amendment II of the Constitution which shows that the Framers desired to protect the citizen "militia" from the danger of "standing armies." See, *e.g., Notes,* September 25, 1787, *Documents,* p. 725 (George Mason); *Annals of Congress,* cols. 749-750; *Patterson,* pp. 181-182 (Elbridge Gerry).

A central theme in *Selective Draft Law Cases, supra,* is the notion that conscription is an inherent power of Government. To buttress that theme, the Court pointed to the fact that conscription was practiced by a number of foreign governments in 1918. *Selective Draft Law Cases, supra,* 245 U.S. at 378-379 (Footnote 1). While there is arguable merit in the idea that a citizen owes his personal services to the

defense of his country, it should be remembered that the fathers of the country thought of such service as service in the "militia." *Cf.*, Washington, *Sentiments on a Peace Establishment, supra*, *Commins*, p. 480. Needless to say our *Constitution* derives its meaning from the intentions of the Framers—not the acts of foreign governments in 1918.

When all is said and done, the central error in *Selective Draft Law Cases, supra*, is the failure of the Court to comprehend the simple truth that the Framers conceived of "armies" as professional troops and "militia" as citizen troops including all compelled to render military service —a point which can be documented by a mountain of historical evidence, only a small portion of which has herein been briefly set forth merely for purposes of illustration. For further critique of *Selective Draft Law Cases, supra*, see: Black, *"The Selective Draft Law Cases—a Judicial Milepost on the Road to Absolutism,"* XI Bost. L. Rev. 37 (1937); see also: Friedman, *Conscription on the Constitution: the Original Understanding, supra*. *Cf.* Taney, *supra*. *Kneedler v. Lane, supra*, is good background, but one should be cautioned relative to several important historical errors, particularly in the opinions of Read and Strong, JJ.

E. Conclusion.

The seriousness of the problems and massive distress created by the current draft system is altogether obvious: In terms of individuals affected, the constitutionality of that system is one of the greatest legal issues of our day. The constitutionality of that system is in grave doubt by reason of considerations and facts not called to the attention of this Court when it first decided that Congress may "raise armies" by conscription over fifty years ago in *Selective Draft Law Cases, supra.* The gravity of the doubt has been forthrightly and honestly acknowledged by the United States Court of Appeals for the Eighth Circuit. Unless and until that doubt is resolved one way or another, a shroud of illegality will be cast over each and every induction ordered pursuant to the Military Selective Service Act of 1967, and it will be only a matter of time before the Courts are virtually flooded with litigation revolving around the simple, yet sweepingly crucial distinction between the constitutional power to "raise armies" and the constitutional power of "calling forth the militia." At the very least our young male citizens and their loved ones are entitled to a clear analysis by this Court of what the Framers really did intend with respect to compulsory military service—if the Framers did intend conscript "armies," *Selective Draft Law Cases, supra,* are insufficient to show it. Grave legal doubts relative to serious practical problems cannot long endure in a restless society without awesome consequences.

Again, we are not asking the Court to consider the claim that all forms of compulsory military service are illegal: on the contrary, we merely propose a question relative to prudent limitations on the use and organization of citizen soldiers.

Nor do we ask this Court to legislate: We propose nothing requiring sociological jurisprudence or judicial philoso-

phizing: We simply ask the Court to interpret and apply the *Constitution* on the basis of objective, demonstrable historical fact, and according to the principle that the *Constitution* must be interpreted to effect the intentions of the Framers rather than the political passions of the day.

Wherefore petitioner prays that a writ of certiorari issue: A judicial invitation has been extended; a serious question begs a serious answer; the citizen "militia" awaits a transpicuous determination of its ancient rights.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. 3-68 Cr. 51

United States of America,

Plaintiff,

vs.

George William Crocker,

Defendant.

ORDER DENYING MOTION FOR ACQUITTAL, OR FOR ARREST OF JUDGMENT, OR FOR A NEW TRIAL

The above case came before the court on January 2, 1969, at St. Paul, Minnesota, on the post-verdict motion of defendant for a judgment of acquittal or dismissal, for arrest of judgment, or in the alternative for a new trial.

Peter J. Lindberg, Esq., of Minneapolis, Minnesota, appeared for defendant in support of the motion; Patrick J. Foley, United States Attorney by William E. Falvey, Esq., Assistant United States Attorney, appeared for the United States in opposition thereto. Earlier, and following the jury's verdict of guilty, the court on motion granted leave to Chester A. Bruvold and John R. Graham, Esqs., attorneys in Minneapolis, Minnesota, to file briefs amicus curiae and to appear and argue orally in support thereof.

The court has reviewed the evidence in the case, has heard the arguments of counsel, has read briefs submitted by defendant's counsel and by amicus curiae, and on the basis thereof and on all of the files, records and proceedings herein,

IT IS ORDERED that defendant's motion be, and the same hereby is, in all things denied.

IT IS FURTHER ORDERED that the case be referred to the Probation Officer of this court for a presentence investigation and report to the court.

Dated: January 16, 1969.

/s/ PHILIP NEVILLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. 3-68 Cr. 51

United States of America,

Plaintiff,

vs.

George William Crocker,

Defendant.

NEVILLE, District Judge.

Defendant, 20 years of age, was indicted for failure to perform a duty required of him under the Universal Military

Training and Service Act and the rules, regulations and directions made pursuant thereto, in that he failed and neglected to comply with an order of his Local Board to report for and submit to induction into the Armed Forces of the United States, in violation of Title 50, Appendix, United States Code, Section 462. The case was tried before a jury at St. Paul, Minnesota on November 27, 1963. The jury returned a guilty verdict. Defendant's own testimony was to the effect that he had indicated on his original classification questionnaire that he wished to be considered a conscientious objector; that on receiving from his Local Board what is known as Form #150, a form designed to provide detail as to the basis for a conscientious objector's belief, defendant discussed it with several people and concluded not to complete it and sent it back to his Board blank; that in his opinion anything relating to the Selective Service Act is wrong and symbolizes a totalitarian state. There was other evidence that later communications from the Local Draft Board to defendant went unanswered and in one or more instances such were returned unopened. Defendant was subsequently classified 1A. He took no appeal from this classification as permitted by law and the rules and regulations of the Selective Service Law. There is no question in the court's mind but that the jury was warranted in finding defendant's failure to obey the order of his Local Draft Board knowing and willful.

Defendant and the lawyers appearing amicus curiae contend that the Universal Military Training and Service Act is unconstitutional during peace time in that it creates an involuntary servitude within the meaning of the prohibition of the Thirteenth Amendment to the United States Constitution, and is in excess of the powers conferred on the Federal Government by Article I, Section 8 of the Constitution. Counsel have submitted briefs expanding on both of these

contentions. For the reasons stated below, this court is not convinced that the power of Congress to provide for the common defense is as limited as counsel urge. This court must consider the United States Constitution itself and the appellate court decisions interpreting its provisions. Arguments attempting to show the lack of wisdom of the Vietnam War or of the draft system are not rightly directed to the court, but rather are political questions belonging in the halls of Congress. See *United States v. Sisson*, 37 U.S.L.W. 2301 (D.C. Mass. Nov. 25, 1968).

Defendant claims that all cases heretofore decided have erroneously sustained the constitutionality of the draft in reliance on the *Selective Draft Cases*, 245 U.S. 366 (1918), and that that case patently was wrongly decided. Defendant does not attempt to distinguish that case except to say that it involved war time conscription, whereas the present law was not passed during a formally declared state of war. The court does not believe that the Selective Draft Cases can be distinguished on the ground urged and since it is a decision of the highest court of the land, it must be followed by this court unless and until overruled. See also *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Lichter v. United States*, 334 U.S. 742, 756, n. 4 (1948).

Both the defendant and amicus curiae argue that at the time of the adoption of the Constitution an "army" was a professional voluntary non-conscript force and that both those favoring a strong central government and those favoring greater power for the states were in agreement that conscription was undesirable. Hence, they argue, the Constitution must be read to prohibit a national conscript army. As a further basis it is argued that state militias were conscript citizen armies and that hence only by following those clauses of Article I, Section 8 of the Constitution which deal

with militia and their federal service can a conscript army be raised.

The only case cited by defendant in support of this view is *Kneedler v. Lane*, 45 Pa. St. 238 (1863), wherein was challenged the constitutionality of the 1863 conscription Act. Not only was the Act eventually upheld by that state court, but the case is superseded as far as this court is concerned by the *Selective Draft Cases*, 245 U.S. 366 (1918). For a complete discussion of the *Kneedler* case, and the contentions advanced in the case at bar, see the excellent and exhaustive memorandum by Senior District Judge John Delehant in *United States v. Richmond*, 274 F. Supp. 43, 66-75 (C.D. Cal. 1967). Compare Bernstein, *Conscription and the Constitution: The Amazing Case of Kneedler v. Lane*, 53 A.B.A.J. 708 (1967). A multitude of other cases have likewise sustained Congressional power to conscript whether or not a state of war had been formally declared by Congress. See *e.g.*, *United States v. O'Brien*, *supra*; *United States v. Hogan*, 369 F.2d 359 (2nd Cir. 1966); *Howze v. United States*, 272 F.2d 146, 148 (9th Cir. 1959).

Defendant's second claim that a peacetime draft law violates the Thirteenth Amendment to the Constitution which prohibits involuntary servitude also has continually been rejected by the courts. Even before the Selective Draft Cases, the Supreme Court had said:

> ". . . he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense." *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905).

Conceding the unanimous judicial rejection of this argument, defendant claims that none of the courts so ruling have correctly applied the Amendment. This court is not

the proper forum in which to overrule the Supreme Court and the various Courts of Appeal that have considered the issue.

Whatever the logic of defendant's arguments of whatever ultimate different position, if any, the United States Supreme Court might some time take, if the validity of the draft "in time of peace" is still an open question—see dissent of Justice Douglas in *Holmes v. United States*, 391 U.S. 936 (1968)—this court deems itself bound by the current decisions of the Court of Appeals of its own Eighth Circuit. The most recent case, *Ashton v. United States*, ... F.2d ..... (8th Cir. #19,213, Dec. 3, 1968) met defendant's contention squarely in these words:

> "Ashton first attacks the over-all constitutionality of the draft laws and the alleged illegal use of draftees because there exists no emergency or declaration of war. *Such attack merits little discussion.* This argument has been consistently rejected. *Selective Draft Law Cases*, 245 U.S. 366 (1918); *United States v. Hogan*, 369 F.2d 359 (2 Cir. 1966); *United States v. Bolton*, 192 F.2d 805 (2 Cir. 1951) (per curiam); *United States v. Henderson*, 180 F.2d 711 (7 Cir. 1950); *United States v. Herling*, 120 F.2d 236 (2 Cir. 1951).
>
> "The United States Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), recently observed in the draft card burning case:
>
> "'The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. *Lichter v. United States*, 334 U.S. 742, 755-58 (1948); *Selective Draft Law Cases*, 245 U.S. 366 (1918); see also *Ex Parte Quirin*, 317 U.S. 1, 25-26 (1942). *The power of Congress to classify and conscript manpower for military* service is beyond question." (Emphasis added.)

See also *Vaughn v. United States*, ... F.2d ..... (8th Cir. #19,125, Dec. 4, 1968), where the court summarily disposed of the argument that the Selective Service Act is unconstitutional.

A separate order has been entered denying defendant's motion for acquittal, or for arrest of judgment, or alternatively for a new trial.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 19,673 and 19,737

United States of America,

Appellee,

vs.

George William Crocker,

Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

[January 8, 1970.]

Before VAN OOSTERHOUT, Chief Judge; and MATTHES and HEANEY, Circuit Judges.

HEANEY, Circuit Judge.

The appellant, George William Crocker, was convicted of failing to report for and submit to induction into the Armed Forces of the United States in violation of 50 App.

U.S.C. § 462. The decision of the United States District Court for the District of Minnesota is reported at 294 F. Supp. 776 (D. Minn. 1969). We affirm.

The appellant noted on his original classification questionnaire that he wished to be classified as a conscientious objector. Shortly thereafter, the appellant received from his Local Board a form, known as Form 150, which is designed to provide a detailed basis for the conscientious objector's belief. The appellant discussed the filling out of this form with several people, concluded not to complete the form, and sent it back blank to his Local Board. The appellant, a pacifist, is of the opinion that any cooperation with the Selective Service System is wrong. The appellant was subsequently classified 1-A. He took no appeal from his classification as permitted by the rules and regulations of the Selective Service Law.

The appellant's only defense in the District Court and his only argument on appeal is that the Military Selective Service Act of 1967, 50 App. U.S.C. §451, *et seq.*, is unconstitutional. Primarily, the appellant argues that the Act is unconstitutional under Article I, Section 8, Clauses 12, 15, 16 and 18; Article I, Section 10, Clause 3; and, Amendment II of the United States Constitution. He argues that, according to the Framers of the Constitution, the precise meaning of the word "armies" refers to professional troops, and that the meaning of "militia" refers to citizen troops, including everyone *compelled* to render military service. He argues that, on the basis of these precise meanings: (1) Congress has no power to conscript "armies"; (2) Congress may compel military service only by "calling forth the militia"; and (3) the Military Selective Service Act of 1967 is not a "proper" means of "raising armies," and it circumvents the constitutional process for "calling forth the militia."

The constitutionality of conscripting "armies" was first fully examined and upheld by the Supreme Court in *Selective Draft Law Cases,* 245 U.S. 366 (1918). The question has been raised many times since then, but in every instance, the Court has upheld the constitutionality of conscription.[1] This Court has followed the decisions of the Supreme Court. See, *e.g., Ashton v. United States,* 404 F.2d 95 (8th Cir. 1968), *cert. denied,* 394 U.S. 960 (1969); *Humes v. Pescor,* 148 F.2d 127 (8th Cir. 1945).

Recently, the most frequently used argument, contesting the constitutionality of conscription, has been that *Selective Draft Law Cases, supra,* was decided while the United States was under a formal declaration of war; that the question decided, therefore, applied only to conscription during time of war; and that the constitutionality of conscription, in the absence of a declaration of war, is still an open question. The courts, however, have consistently rejected this argument, relying primarily on *Selective Draft Law Cases, supra.*[2] The appellant notes that such an argument presupposes the constitutional power to "raise armies" by conscription. He further notes that Article I, Section 8, Clause 12, does not distinguish between war and peace.

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[1]Shortly after the Court rendered its decision in *Selective Draft Law Cases,* 245 U.S. 366 (1918), it granted an appeal which raised similar constitutional arguments. Relying on its decision in *Selective Draft Law Cases, supra,* the Court again upheld the constitutionality of conscripting "armies." *Cox v. Wood,* 247 U.S. 3 (1918).

For other cases, see, e.g., *United States v. Nugent,* 346 U.S. 1 (1953); *Lichter v. United States,* 334 U.S. 742 (1948); *Hamilton v. University of California,* 293 U.S. 245 (1934); *Tatum v. United States,* 146 F.2d 406 (9th Cir. 1944); *United States v. Herling,* 120 F.2d 236 (7th Cir. 1941). See also, Note 2.

[2]*United States v. O'Brien,* 391 U.S. 367 (1968); *United States v. Hogans,* 369 F.2d 359 (2d Cir. 1966); *Etcheverry v. United States,* 320 F.2d 873 (9th Cir.), *cert. denied,* 375 U.S. 930 (1963); *United States v. Henderson,* 180 F.2d 711 (7th Cir.), *cert. denied,* 339 U.S. 963 (1950); *United States v. Richmond,* 274 F.Supp. 43 (C.D. Cal. 1967).

Moreover, he clearly illustrates that such is not his argument here.

The appellant argues here that the precise meaning of the words "armies" and "militia," as used by the Framers of the Constitution, was misconstrued by the Court in *Selective Draft Law Cases, supra*,[3] perhaps because the argument advanced here, based upon constitutional history, was not advanced when the question was first decided.

The reasons advanced by the appellant for overturning the decisions of the Supreme Court are serious and thoughtful. But, we cannot overturn the decisions of the Supreme Court here. *Ashe v. Swenson*, 399 F.2d 40 (8th Cir. 1968), *cert. granted*, 393 U.S. 1115 (1969); *Ferina v. United States*, 340 F.2d 837 (8th Cir.), *cert. denied*, 381 U.S. 902 (1965).

The appellant's second argument is that compulsory military service is unconstitutional as violative of his Thirteenth Amendment right against involuntary servitude. This claim has been squarely faced and rejected by the Courts. See, *e.g., Selective Draft Law Cases, supra; Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

The judgment of the District Court is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[3]It appears that one Supreme Court Justice would vote to grant certiorari in order to re-examine the basis of *Selective Draft Law Cases*. See, *Holmes v. United States*, 391 U.S. 936 (1968) (denial of cert.) (dissenting opinion of Justice Douglas).

APPENDIX B

§ 451. SHORT TITLE; CONGRESSIONAL DECLARATION OF POLICY

(a) This Act may be cited as the "Military Selective Service Act of 1967."

(b) The Congress declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation.

* * * * *

---

§ 454. PERSONS LIABLE FOR TRAINING AND SERVICE

(a) *Age limits; training in National Security Training Corps; physical and mental fitness; adequate training facilities; assignment to stations and units; training period; medical specialist categories.*

Except as otherwise provided in this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], every male citizen of the United States and every male alien admitted for permanent residence, who is between the ages of 18 years and 6 months and 26 years, at the time fixed for his registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title [section 453 of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], shall be liable for training and service in the Armed Forces of the United States: * * *

* * * * *

* * * The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title [said sections] (including but not limited to selection and induction by age

group or age groups) such number of persons as may be required to provide and maintain the strength of the Armed Forces.

* * * * *

The persons inducted into the Armed Forces for training and service under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix] shall be assigned to stations or units of such forces. Persons inducted into the land forces of the United States pursuant to this title [said sections] shall be deemed to be members of the Army of the United States; * * *.

* * * * *

Every person inducted into the Armed Forces pursuant to the authority of this subsection after the date of enactment of the 1951 Amendments to the Universal Military Training and Service Act [June 19, 1951] shall, following his induction, be given full and adequate military training for service in the armed force into which he is inducted for a period of not less than four months, * * *

* * * * *

(b) *Length of service; release of individuals accepted into Army National Guard, Air National Guard, and other reserve components.*

Each person inducted into the Armed Forces under the provisions of subsection (a) of this section shall serve on active training and service for a period of twenty-four consecutive months, unless sooner released, transferred, or discharged in accordance with procedures prescribed by the Secretary of Defense (or the Secretary of the Treasury with respect to the United States Coast Guard) or as otherwise prescribed by subsection (d) of section 4 of this title [subsection (d) of this section]. * * *

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1201

GEORGE W. CROCKER,

Petitioner,

—v.—

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND THE MINNESOTA CIVIL LIBERTIES UNION, AMICI CURIAE, IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE

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OCTOBER TERM, 1969

No. 1201

GEORGE W. CROCKER,

Petitioner,

—v.—

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND THE MINNESOTA CIVIL LIBERTIES UNION, AMICI CURIAE, IN SUPPORT OF PETITION FOR CERTIORARI

Interest of Amici

In this case, petitioner was convicted under the Military Selective Service Act of 1967 of refusing to submit to induction into the armed forces. Among other grounds raised on appeal, petitioner claimed that the Act was unconstitutional. The conviction was affirmed by the Court of Appeals for the Eighth Circuit.

Amici file this brief* to urge the Court to grant the petition so that it might closely examine the asserted con-

---

* The written consents of the parties have been filed with the Clerk of the Court.

stitutional foundation of the Military Selective Service Act of 1967. Amici believe that such a close examination, together with a re-examination of the basis for decision in the *Selective Draft Law Cases*, 245 U.S. 366 (1918), will reveal an absence of constitutional authority for peacetime conscription. This brief summarizes the results of historical research which has led amicus to conclude that the Founding Fathers did not intend, in drafting the Constitution, to empower the government to impress man into military service in peacetime. We believe it will be of substantial interest to the Court.

Reasons for Granting the Writ

Today there are few more vital issues in the relationship between man and his government than the asserted right of the state to demand military service from its citizens and the asserted duty of all able-bodied men to respond to that claim. Yet, despite the importance of this problem, it has been fully examined by this Court only once, in the *Selective Draft Law Cases* (*Arver v. United States*), 245 U.S. 366 (1918), a case now fifty-two years old. Further, the *Arver* case reviewed the problem only in a war-time setting, after a solemn declaration of war had been made by Congress. More important, the case rested on the most dubious historical and legal evidence. Only three pages of the Government's brief and one paragraph of the defendants' briefs were devoted to the intentions of the men who framed the Constitution as revealed at the Philadelphia and state conventions, traditionally the most important source of constitutional interpretation. Thus the Court's decision ignored crucial historical evidence that the framers

of the Constitution did not intend to give Congress the power to conscript directly.

This case will therefore present to this Court for the first time a challenge to the constitutionality of federal conscription in peacetime, based upon a comprehensive historical analysis of the framing and adoption of the Constitution. Although 183 years have passed since the Philadelphia Constitutional Convention, no detailed study of the framers' intention and purpose concerning the military clauses has been passed upon by any federal court, least of all the Supreme Court. This case attempts to correct that omission.

It is impossible in this short amici brief to cite all the historical evidence bearing upon the question of peacetime conscription.[1] What follows is a brief outline of the material which will be fully developed by the amici if certiorari is granted.

I.

1. The framers of the Constitution considered a standing professional army the greatest danger to liberty. The overreachings of the royal armies during the later Stuart period of England[2] as well as the behavior of British

---

[1] A recent article by one of the counsel for amici herein indicates the type of material which will be presented by amici if certiorari is granted. See Friedman, "Conscription and the Constitution: The Original Understanding," 67 *Michigan Law Review* 1493 (1969).

[2] Proposals to conscript for the British regular army were advanced in Parliament in 1704 and 1707 but were firmly rejected. See Freeman, "The Constitutionality of Peacetime Conscription," 31 Va.L.Rev. 40, 68-69 (1944). Conscription was never in force in England until 1916, except for limited militia service which was carefully restricted. See Friedman, *op. cit.*, 1499-1503.

troops in the colonies before the Revolutionary War convinced the American statesmen that strict control over the military was a vital safeguard against tyranny. In the same vein the colonial leaders were wary of lodging too much power in any central government which could trample on the liberties of the people. Thus even during the Revolution, Congress refused to implement any scheme of federal conscription and relied instead on a system of quotas and levies from the state militia forces to fill out the Continental army.[3] The quota system was cumbersome and unreliable since the states were slow to supply men and could not be compelled to do so. Since the states also fell behind in making payments to the central treasury, the Continental Congress was hamstrung in its efforts to keep up and control its own military forces.

2. The revolutionary experience led the leading colonial statesmen to conclude that a stronger central government with the power to control its own army was vital for national defense. On the very first day of the Philadelphia Constitutional Convention in 1787, Edmund Randolph, leader of the Virginia delegation, complained that the Confederation could not defend itself and a new system of organizing the government was necessary. Randolph introduced a new plan which became the skeleton of the new Constitution. But Randolph made clear in his speech intro-

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[3] Thomas Jefferson expressed the prevailing sentiment in the states against conscription in a letter to John Adams, dated May 16, 1777:

> Our battalions for the Continental service was sometime ago so far filled as rendered the recommendation of a draught from the militia hardly requisite. And the more so as in this country it ever was the most unpopular and impracticable thing that could be attempted. Our people under the monarchial government have learnt to consider it as the last of all oppressions. 2 *Papers of Thomas Jefferson* 18 (J. Boyd ed. 1950).

ducing the so-called Virginia plan, that it did not give the federal government carte blanche in organizing its army. He said:

> "What reason to expect that the Treasury will be better filled in future, or that money can be obtained under the present powers of Congress to support a war. *Volunteers* not to be depended on for such a purpose. *Militia* difficult to be collected and almost impossible to be kept in the field. *Draughts stretch the strings of government too violently to be adopted.* Nothing short of a military force will answer the end of war, and this only to be created and supported by money."
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> 1 Farrand, *Records of the Federal Convention* 25 (1911) (Emphasis supplied.)

Thus on the very first day of the Convention, Randolph, an initiator of the Constitution, excluded the power of the federal government to draft. As a strong Federalist figure who wished to give the new central government wide powers, Randolph's denial of that authority is especially significant. He and other Federalist figures were anxious to grant the new government the right to enlist its own army, a power which it lacked under the Confederation. Many Antifederalist leaders, remembering the dangers of a peacetime professional military force, wanted to rely only on the state militia and saw no need for any kind of national army. The debate at the Convention and during ratification centered on the lesser alternative of enlistment of a federal force, which many thought was unnecessary. *A fortiori*, the power to draft was unthinkable to the statesmen of the time.

3. *The Federalist Papers*, written by Madison and Hamilton confirm that the militia was to be the main

military force. A small professional force was required only to repel a sudden invasion until the militia could be mobilized. A federal army would also guard the frontiers. But Madison and Hamilton made clear that the people at large would satisfy their military obligations only through the militia which could be federalized only under limited conditions and not in a regular army.[4]

4. In the state ratifying debates, the impossibility of conscription was reflected in many ways. The Anti-federalists opposed the Constitution because it gave the federal government the power to tax but they never complained of the power to conscript. In discussing the military clauses, these critics stated that the citizens at large could be taken into the militia and then made subject to court martial jurisdiction.[5] No such complaint was made about the power to raise armies since no one thought any citizen could be taken into the regular army against his will.

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[4] In Federalist No. 24, Hamilton wrote about the frontier forts:

"These garrisons must either be furnished by occasional detachments from the militia, or by permanent corps in the pay of the government. The first is impracticable; and if practicable, would be pernicious. The militia would not long, if at all, submit to be dragged from their occupations and families to perform that most disagreeable duty in times of profound peace. And if they could be prevailed upon, or compelled to do it, the increased expense of a frequent rotation of service and the loss of labor, and disconcertion of the industrious pursuits of individuals, would form conclusive objections to the scheme. It would be as burthensome and injurious to the public, as ruinous to private citizens. The latter resource of permanent corps in the pay of government amounts to a standing army in time of peace; a small one, indeed, but not the less real for being small." (J. Cooke ed. 1961, at pp. 156-157)

[5] See particularly the debates in the Maryland convention, 2 J. Elliott, Debates (2d Ed. 1836) at 552.

Many antifederalists introduced amendments to limit the term of enlistments but never suggested any restriction on conscription.[6] All of these attacks on the Constitution were predicated on the assumption that no power to draft existed in the federal government. Furthermore, the delegates in the state ratifying conventions often identified the military powers under the new Constitution as identical to those under the old Confederation which admittedly had no power to conscript.[7]

5. The First Congress, composed of many of the founding fathers, also showed that it did not contemplate any federal power to conscript. Madison introduced a conscientious objector clause in the Bill of Rights, but it would have protected only militiamen and not regular army soldiers.[8] If he thought the citizens at large could be taken into the federal army, he would surely have suggested similar protection in that situation. The Second Amendment itself which sought to protect the state militia from being destroyed by the federal government is inconsistent with any federal power to conscript. Many comments of individual Congressmen also support this view.[9]

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[6] 2 Debates 552, 4 *id.* at 245, 3 *id.* at 660.

[7] 2 Debates 352, 468, 537.

[8] 1 Annals of Congress, 1st Cong., 434.

[9] See, e.g., remarks of Elias Boudinot, once President of the Continental Congress and in 1789 a Representative from New Jersey, who defended the conscientious-objector clause. "In forming a militia," he said, "an effectual defence ought to be calculated, and no characters of this religious description ought to be compelled to take up arms." He added that "by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms." 1 *Annals of Congress*, 1st Cong., 767. Since the clause in question related only to the militia, Boudinot's concern for the protection of con-

6. The *Selective Draft Law Cases* of 1918 did not have all this historical evidence before it. Instead, the Supreme Court cited the universality of conscription in 1918 and the supposed existence of conscription in England and the colonies as support for the view that the federal government could draft. But in 1789 when the Constitution had been adopted, no country in the world had exercised the power to conscript its citizens as a whole.[10] In England and the colonies, a militia system had been instituted, but it had no relation to a modern draft. The militia was thought of as the whole body of male citizens who were expected to own a weapon, enroll, appear for training sessions and help defend their community when emergencies arose. But generous provisions existed for substitutions or payment of militia fines in lieu of service. The militia was thought of as a local defensive unit which would not be sent out of its organizing county or colony. It could be called into service only under specified conditions. In England practically no one had to serve in the militia against his will and in the colonies most compulsory elements in the militia were fading in the years before the Revolutionary War.[11] The Constitution recognized the continued status of the state militias and provided that they could be federalized only in the three instances found in Clause 15 of Article I, Section 8.

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scientious objectors would be meaningless if Congress had the power to conscript for the regular army. For in that case the general government would be able "to compel all its citizens [including conscientious objectors] to bear arms," a power which Boudinot was denying.

[10] See Freeman, *op. cit.* at p. 68.

[11] See Friedman, *op. cit.* 1502-06.

7. The Supreme Court in 1918 also relied on the fact that a conscription plan was introduced into Congress (but not passed) during the War of 1812 and was enacted during the Civil War. But the important point about the 1814 proposal to draft was that it was not accepted by Congress even though the nation had been invaded and the very capital occupied. Senators Jeremiah Mason and David Daggett[12] and Representative Daniel Webster insisted that the federal government had no power to conscript. Webster said:

> "Is this, Sir, consistent with the character of a free Government? Is this civil liberty? Is this the real character of our Constitution. No, Sir, indeed it is not. The Constitution is libelled, foully libelled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their own treasure and their own blood a Magna Carta to be slaves. Where is it written in the Constitution, in what article or section is it contained, that you may take children from their parents, and parents from their children and compel them to fight the battles of any war, in which the folly or the wickedness of Government may engage it? Under what concealment has this power lain hidden, which now for the first time comes to trample down & destroy the dearest rights of personal liberty?" [13]

8. During the Civil War, the first federal conscription law was passed. However, opposition to the law was widespread. Only six per cent of the Union forces were

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[12] *Annals of Congress*, 13th Cong., 3rd Sess. 80, 72.

[13] 14 The Writings and Speeches of Daniel Webster 57 (1903).

drafted. Many statesmen and judges still doubted federal power to draft. Chief Justice Roger Taney wrote a proposed opinion declaring the Enrollment Act unconstitutional,[14] but he never had the opportunity to deliver it. The Pennsylvania Supreme Court held initially that the law was invalid, but the replacement of one of the judges brought about a reversal of that decision.[15]

9. The draft of World War I was also attacked by many critics. But the patriotic pressures of the times made impossible any serious inquiry into Congressional military power. However, the World War I draft took place after a Congressional declaration of war and is not a precedent for peacetime conscription.

10. It is an axiom of constitutional interpretation that the intent of the Constitution-makers must prevail. The frequently cited opinion of Chief Justice John Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819) does not undercut that principle. Marshall indicated that the framers intended the necessary and proper clause to be read broadly and that the traditional means of exercising the powers enumerated in the Constitution and those logically necessary from the express powers enumerated should be available to Congress. However, any power specifically excluded by the framers cannot be utilized.[16]

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[14] 18 Tyler's Quarterly Historical and Genealogical Magazine 79 (1939).

[15] *Kneedler* v. *Lane*, 45 Pa. 238 (1863).

[16] See, e.g., concerning a broad reading of the judicial power, *Popovici* v. *Agler*, 280 U.S. 379, 380 (1930).

11. Furthermore, this Court has consistently refused to restrict any personal rights more narrowly than the framers intended. As was recently noted in *Schneider* v. *Smith,* 390 U.S. 17, 25 (1968), "the purpose of the Constitution and the Bill of Rights . . . was to take government off the backs of people." This Court has suggested in many of its opinions that there is a minimum distance which must be maintained between government and the citizen, between authority and the people.[17] That minimum distance is defined not only by the Bill of Rights, but by the checks and balances within the government, by the separation of powers between the different arms of government, and by the limited grant of authority in the Constitution to the government. It is clear that the military clauses were intended to be not only a *grant* of power but a *restriction* of power, a restriction to protect the citizen against arbitrary government action. That intent of the framers must be given effect by this Court.

12. In many parallel instances in recent years the Court has reexamined the intent of the framers in the field of personal rights and denied the government certain powers which it had claimed and had exercised for many years. The decisions rested in part on an historical analysis of the framers' intent. Thus the power of Congress to exclude members-elect was restricted in *Powell* v. *McCormack,* 395 U.S. 486 (1969); its power to denationalize citizens who voted in foreign elections was overturned in *Afroyim* v. *Rusk,* 387 U.S. 253 (1967); the power of the military to try soldiers in peacetime for non-service connected crimes eliminated in *O'Callahan* v. *Parker,* 395 U.S. 258 (1969).

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[17] See, e.g., *United States* v. *Brown,* 381 U.S. 437 (1965); *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965).

In each case what appeared to be the original understanding of the framers was restored.[18]

13. Amici have argued thus far that this Court should grant certiorari in order to consider the substantial historical evidence, never previously brought to the attention of this Court, that the original understanding of the Constitutional framers was that the power to raise armies was never intended to include the power to conscript. Amici also urge that regardless of how the early constitutional and post-constitutional history may be evaluated, there is such a considerable difference between the exercise of the power to conscript in wartime, and its exercise in peacetime, that this Court should in any event grant certiorari to determine whether the present peacetime draft is within the constitutional power of Congress. This Court has never ruled on the constitutionality of a peacetime draft. In *Hamilton* v. *University of California,* 293 U.S. 245 (1934), the power to draft in wartime was assumed. However, Mr. Justice Cardozo, in his concurring opinion, observed:

> "There is no occasion at this time to mark the limits of governmental power in the extraction of military service when the Nation is at peace." 293 U.S. at 265.

A similar observation was made by Mr. Justice Douglas dissenting from the denial of certiorari in *Holmes* v. *United States,* 391 U.S. 936 (1968), and *Hart* v. *United States,* 391 U.S. 956 (1968). See, also, separate memorandum of Mr. Justice Stewart in *Holmes* v. *United States, supra,* and, dissenting opinion of Mr. Justice Douglas in *United States* v. *O'Brien,* 391 U.S. 367, 389-390 (1968).

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[18] See also *Erie R.R.* v. *Tompkins,* 304 U.S. 64, 72-73 (1938) which overruled *Swift* v. *Tyson,* 16 Pet. 1 (1843) in part because of new historical evidence concerning the intent of the framers.

14. A review of the decisions customarily cited as upholding Congressional power to conscript discloses that in each of them the constitutional power was premised on an actual or contemplated Congressional declaration of war.

(a) The most significant decision is the *Selective Draft Law Cases,* 245 U.S. 366 (1918), upholding World War I conscription. It is unmistakably premised on the constitutional legitimacy of

> "... the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the Nation as the result of a war declared by the great representative body of the people ..." 245 U.S. at 390.

(b) In *United States* v. *Macintosh,* 283 U.S. 605 (1931), this Court held that Congress could properly deny naturalization to an alien who refused to take an unqualified oath to serve "in the armed forces of the nation in time of war ..." 283 U.S. at 623. The entire discussion of Congressional power in *Macintosh* contemplates Congressional power to compel military service in connection with a declaration of war. *Id.* at 622. In *Macintosh* the Court listed a large number of emergency powers which could be exercised by Congress "to the end that war may not result in defeat ..." *Ibid.* Finally, this Court made it clear that it regarded the war powers to include "by necessary implication, the power, *in the last extremity,* to compel the armed services of any citizen in the land ..." 283 U.S. at 624 (emphasis added). Nothing which this Court said in *Macintosh,* or in the *Selective Draft Law Cases,* provides constitutional justification for a peacetime draft. The "last extremity" obviously has not been reached at a time where there has been no declaration of war.

(c) Another case often cited, *Jacobson* v. *Massachusetts,* 197 U.S. 11, 29 (1905), asserts congressional power to compel military service for the country notwithstanding the risk "of being shot down in its defense," again obviously a reference to wartime service.

(d) Wartime decisions of lower federal courts are in accord. See *Heflin* v. *Sandford,* 142 F.2d 798, 800 (5th Cir. 1944) ("The present war is described by its author as 'total war' meaning that every means of destruction will be used, and men, women and children alike killed. It means, also, that total effort may be necessary to resist it, men, women and children all doing what they can."); *United States ex rel. Zucker* v. *Osborne,* 54 F. Supp. 984, 986 (W.D.N.Y. 1944) ("We are not concerned with the power to conscript individuals in time of peace. We are concerned with that power in time of war.").

15. Decisions of this Court at the time of World War II and subsequent thereto which have asserted or reiterated the constitutional power to conscript have likewise referred explicitly and implicitly to a wartime draft. See *Lichter* v. *United States,* 334 U.S. 742, 755-758 (1948) (upholding the Renegotiation Act as "part of a national policy adopted in time of crisis in the conduct of total global warfare . . . ."); *Ex Parte Quirin,* 317 U.S. 1, 25 (upholding the validity of special wartime commission to try enemy spies as within Presidential power "as Commander-in-Chief of the Army in time of war and of grave public danger . . . "). In *United States* v. *O'Brien, supra,* this Court again asserted that the Constitutional power of Congress to raise and support armies includes the power "to classify and conscript manpower for military service . . .," 391 U.S. at 377, citing as authority for this power the prior decisions of this Court

in *Selective Draft Law Cases, supra, Lichter* v. *United States, supra,* and *Ex Parte Quirin, supra.* Since the decision in *O'Brien* contains no discussion or analysis whatsoever of the constitutional distinctions between wartime draft and peacetime draft, it is plain that the *O'Brien* decision is no more a precedent for the legitimacy of peacetime conscription than the earlier cases discussed previously.[19]

16. Review by this Court of the differing perimeters of constitutionality of wartime and peacetime conscription is vital because of the acknowledged total impact which conscription has upon the individual. It is hardly debatable that compulsory military service, whether in time of war or peace, is always a severe deprivation of civil liberties. Assuming that this deprivation is constitutionally tolerable "in the last extremity," see *Hamilton* v. *University of California, supra,* the question which has not yet been answered is whether such a totality of deprivation of liberty in peacetime exceeds constitutional limits. The liberties involved have all been recognized by this Court as constitutionally protected in other contexts. Conscription obviously affects one's right of movement, residence and travel.

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[19] In *United States* v. *O'Brien,* this Court upheld, as within the constitutional power to conscript, the validity of a statute penalizing willful destruction or mutilation of a selective service registration certificate. It does not implicitly follow that in upholding the constitutionality of requiring possession of a peacetime draft registration certificate, the Court simultaneously upheld the constitutionality of peacetime conscription. There is considerable difference between compelling registration in peacetime for possible wartime conscription, and in actually ordering someone conscripted in peacetime. The recent *Report of the President's Commission on an All-Volunteer Armed Force* (February 1970) (the Gates Commission) recommended a volunteer armed force in peacetime, and a structure for quickly reinstituting a standby draft in time of war or other national emergency, including, specifically, "A register of all males who might be conscripted when essential for national security." Report, p. 119.

See *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964); *Edwards* v. *California,* 314 U.S. 160 (1941). Conscription precludes the right to engage in one's chosen profession. See *Truax* v. *Raich,* 239 U.S. 33 (1915); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). It is a deprivation of property, since it imposes a form of in kind taxation on a selected group of young men rather than by financial taxation of the nation as a whole to pay the actual economic value of the conscripted services. See Report of Gates Commission, *supra,* Chapter 3, "Conscription Is a Tax", *passim.*[20] See also Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* 17-29,

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[20] "Draftees and draft induced volunteers in such a force are coerced into serving at levels of compensation below what would be required to induce them to volunteer. They are, in short, underpaid. This underpayment is a form of taxation." Report of Gates Commission, at 23-24. "Under conscription, each inductee and reluctant volunteer is compelled to render services to the government. He is required to pay a tax—a tax paid (and collected) in kind rather than cash—but the form of the payment does not alter the substance of the relationship. The amount of the tax is the difference between the pay that the inductee or reluctant volunteer actually receives as a first-term serviceman and the pay that would be required to induce him to enlist." *Id.* at 24-25. "What is of questionable morality is the discriminatory form that this implicit tax takes; and even more, the abridgement of individual freedom that is involved in collecting it." *Id.* at 27. "Is it right and proper that a large tax be confined to a small fraction of our young able-bodied males in order to relieve taxpayers in general from having to pay high taxes?" *Id.* at 27-28. "It is unlikely that any Congressman would ever propose enactment of a general tax of the kind now imposed by the draft. If one ever were proposed, it would have little chance of being approved by Congress. If approved by Congress, *it is hard to imagine that it would be held constitutional by the courts.* This is a hidden tax which persists only because it is obscure. No tax is perfect, of course, but it is hard to imagine a means of imposing the cost of defense, or any other Government activity for that matter, more in conflict with accepted standards of justice, equality and freedom in the United States." *Id.* at 28. (Emphasis added.)

57-59 (1967). Furthermore, compulsory military service infringes on freedom of speech and association, since persons in the military are obviously held to a more restricted standard than persons in civilian life. See *United States* v. *Howe,* 17 USCMA 165, 37 CMR 429 (1967). Likewise, a person drafted into the armed services becomes subject to military law, as well as to military commands, and is thereby deprived of many constitutional safeguards which are not provided in the Uniform Code of Military Justice, 10 USC §§801, et seq., including principally trial by jury. See *O'Callahan* v. *Parker,* 395 U.S. 258 (1969).

In addition, it makes the individual, regardless of his wishes, an instrument of foreign and military policy with which he may disagree, either generally or specifically. Yet he has no choice but to obey his military orders requiring him to be such an instrument.[21]

No citations are needed to emphasize the most egregious deprivations effected by a military draft: severe bodily injury, maiming for life, and in many cases death. Perhaps the only thing which might be more severe than deprivation of life, is requiring an individual to become a killer of others. This is the ultimate deprivation of liberty imposed by a military draft.[22]

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[21] "By handing boys over to the arbitrary and complete domination of the Government, we put it in the power of the Government to indoctrinate them with political doctrines then popular with the Government. In wartime it is bad enough; in peacetime it would be intolerable." Senator Robert A. Taft, quoted in statement by Rep. Lindsay, 110 Cong. Record 8575-6 (April 21, 1964).

[22] Statutory provisions exempting conscientious objectors from compulsory military service may satisfy the constitutional guarantee of religious liberty for those judged to meet the statutory requirements. But for all persons, conscientious objectors or otherwise, it cannot be doubted that when the government "orders citizens to kill or die, it comes close to the limits that even Hobbes put down around the authority of Leviathan." Christian Bay, quoted in Kaufman, "The Selective Service System," in Finn (ed.), A Conflict of Loyalties 252 (1968).

17. The due process clause of the Fifth Amendment protects "certain fundamental personal liberties from abridgment by the federal government", *Griswold* v. *Connecticut,* 381 U.S. 479, 492 (1965) (concurring opinion by Mr. Justice Goldberg). If these personal liberties protected by the Fifth Amendment include freedom of travel, *Aptheker* v. *Secretary of State, supra;* right of privacy, *Griswold* v. *Connecticut, supra;* right to employment, *Truax* v. *Raich, supra;* right to attend private religious school in lieu of public school, *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535 (1925); and right to instruction in a foreign language, *Meyer* v. *Nebraska,* 262 U.S. 390, 399-400 (1923); then *a fortiori,* the Due Process Clause must include the protection of a fundamental personal liberty which is infinitely more dear, the liberty to be free from compulsory military service in the absence of a declaration of war and ultimately to be free of the risk of death and the compulsion to kill others.

18. As encompassing as the war power undoubtedly is, it is equally clear that the Constitution places limits on its exercise. It is axiomatic that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit." *United States* v. *Robel,* 389 U.S. 258, 263 (1967). The due process clause is a limitation on all Governmental power, "even the warpower," *Galvan* v. *Press,* 347 U.S. 522, 530 (1954); "The exercise of the warpower . . . is subject to the Fifth Amendment." *Hamilton* v. *Kentucky Distilleries and Warehouse Company,* 251 U.S. 146, 155 (1919). See *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963); *Harmon* v. *Brucker,* 355 U.S. 579 (1958); *Reid* v. *Covert,* 354 U.S. 1 (1957); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952); *United States* v. *Cohen Grocery Company,* 255 U.S. 81, 88 (1921).

19. Attempts by the legislature or the executive to exercise extraordinary powers posited on the existence of a wartime emergency have been subject to judicial review of whether the emergency exists or, once having existed, still persists. This Court has exercised such power of judicial review as far back as the Mexican War. See *Mitchell* v. *Harmony,* 13 How. 115, 134 (1851), where Chief Justice Taney, in reviewing the propriety of a certain taking of property by a military expedition, reviewed the law and concluded "that in all of these cases, the danger must be immediate and pending . . . it is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified." Accord: *United States* v. *Russell,* 80 U.S. 623, 628 (1871) ("Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified."). In *United States* v. *Macintosh,* 283 U.S. 605, 622 (1931), this Court was clear in its statement that the entire panoply of enormous war powers might be invoked by Government, but only "when necessity calls for its exercise. . . ."[23]

In *Hamilton* v. *Kentucky Distilleries and Warehouse Company,* 251 U.S. 146 (1919), Mr. Justice Brandeis, for a unanimous court, concluded that the World War I Prohibition Act, enacted pursuant to the exercise of wartime emergency powers, was not constitutionally deficient even

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[23] The *Macintosh* majority listed among the war powers: restrictions on freedom of speech and press and trial by jury; confiscation of property without compensation; fixing of prices; taking over of railroads; ". . . and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war." 283 U.S. at 622.

though the war was over because wartime emergency economic conditions still persisted. Nevertheless, the entire court conceded the principle "that the question of the continued validity of the War Prohibition Act under the changed circumstances depends upon *whether it appears that there is no longer any necessity* for the prohibition of the sale of distilled spirits for beverage purposes. . . ." *Id.* at 163. (Emphasis supplied.) "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed." *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543, 547-48 (1924). Chief Justice Warren has cited a decision of the Supreme Court of Australia, *Illawara District County Council* v. *Wickham,* 101 Commw. L.R. 467 (1959) as "invalidating a far-reaching veterans preference statute on the grounds that with the World War II emergency past, the war-power justification for such laws, under the Australian Constitution, had ceased." Warren, "The Bill of Rights and the Military," in Cahn (ed.), *The Great Rights* 110, n. 50 (1963).

This Court has held that "The conscription of manpower is a more vital interference with the life, liberty and property of the individual than is the conscription of his property or his profits or any substitute for such conscription of them." *Lichter* v. *United States,* 334 U.S. 742, 756 (1948). Amicus respectfully urges that this Court can be no less concerned with reviewing the constitutional basis for the peacetime exercise of manpower conscription than it has been for the peacetime exercise of property conscription. Certiorari should be granted for the reason best stated by former Chief Justice Warren in his James Madison Lecture:

> "... if judicial review is to constitute a meaningful restraint upon unwarranted encroachments upon freedom in the name of military necessity, situations in which the judiciary refrains from examining the merit of the claim of necessity must be kept to an absolute minimum."

Warren, "The Bill of Rights and the Military," in Cahn (ed.), *The Great Rights* 102 (1963).

20. This Court has instructed that where a Governmental regulation impinges on individual liberties, it is incumbent upon Government "to demonstrate that no alternative forms of regulation," *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963) were available. For a dramatic application of this principle, see *In Re Jenison*, 265 Minn. 96, 120 N.W.2d 515 (1963), reversed and remanded 375 U.S. 14 (1963); decision modified in accordance with remand order, 265 Minn. 136, 125 N.W.2d 588, 589 (1963). It is self-evident that a constitutionally acceptable alternative to raising an army by compulsory military service is raising an army by voluntary military service. See Report of Gates Commission, *supra*, Chapter One, "Protecting the Free Society," *passim*. To repeat, neither this question nor any of the other constitutional questions involved in a peacetime draft have ever been decided by this Court.[24] As Mr. Justice Douglas wrote:

> "It is an important question. It is a recurring question. It is coming to us in various forms in many cases as a result of the conflict in Vietnam. I think we owe to those who are being marched off to jail for maintaining that a declaration of war is essential for con-

[24] See Report of Gates Commission, *supra*, at 166.

scription an answer to this important undecided constitutional question."

Holmes v. *United States*, 391 U.S. 936, 20 L.Ed. 2d 856, 864 (1968). "The enemy is not yet so near our gate," *United States* v. *Nugent*, 346 U.S. 1, 13 (1953) (dissenting opinion of Mr. Justice Frankfurter) that traditional constitutional safeguards may be "overborne by military exigencies."

CONCLUSION

For the foregoing reasons, amici respectfully urge that the petition for certiorari be granted.

Respectfully submitted,

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March, 1970.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1201

GEORGE WILLIAM CROCKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25-28; R. 1-4) is not yet reported. The opinion of the district court is reported at 294 F. Supp. 776.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1970 (R. 5). Mr. Justice White extended the time within which to file a petition for

a writ of certiorari to and including February 24, 1970, and the petition was filed on February 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Selective Service law is invalid on the ground that it is not a proper constitutional means for the raising of manpower for military service.

STATEMENT

After a jury trial in the United States District Court for the District of Minnesota, petitioner was found guilty on Count I of an indictment charging him with failure to comply with an order of his local board to report for and to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462 (App. 3, 7).[1] A motion for judgment of acquittal or dismissal, for arrest of judgment, or, alternatively, for a new trial was denied (App. 8-10). On appeal the conviction was affirmed (Pet. App. 25-28; R. 1-5).

There is no dispute as to the evidence which is set forth in the opinions of both courts below (Pet. App. 20-21, 26). Petitioner, a Quaker, at first received a Form 150 questionnaire for conscientious

[1] "App." refers to appellant's printed appendix in the court of appeals, which is part of the record before this Court. Count II of the indictment, charging failure to keep the local board informed as to petitioner's current address, was dismissed on the government's motion prior to trial (App. 2, 7).

objectors, but sent it back blank to his local board. Petitioner was of the view that any cooperation with the Selective Service System is wrong and that such a system symbolizes a totalitarian state. Later communications from the local board to petitioner went unanswered, and in several instances were returned unopened. Petitioner was subsequently classified I-A, but took no appeal from his classification. He failed to appear for induction as ordered by his local board. Petitioner's only defense in the district court and in the court of appeals was that the Selective Service law (50 U.S.C. App. 451 *et seq.*) is unconstitutional.

ARGUMENT

Petitioner makes an intricate historical argument that the Selective Service law is unconstitutional on the ground that it is not a proper means to "raise and support Armies" under Article I, Section 8, Clauses 12 and 18 of the Constitution, in that it circumvents the constitutional processes for "calling forth the Militia" under Article I, Section 8, Clause 15.[2] Reduced to its essence this argument amounts to the claim that these historical materials were not squarely focused upon in the *Selective Draft Law Cases*, 245 U.S. 366, and that accordingly that decision should be reexamined and overruled. In the *Selective Draft Law Cases* the Court did, however, discuss what it deemed to

[2] Petitioner also invokes Article I, Section 8, Clauses 15 and 16; Article I, Section 10, Clause 3; and the Second Amendment (see Pet. 2-3).

be the critical historical considerations.[3] More dispositively, as this Court recently pointed out in *United States* v. *O'Brien*, 391 U.S. 367, 377:

> The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. *Lichter* v. *United States*, 334 U.S. 742, 755-758 (1948); *Selective Draft Law Cases*, 245 U.S. 366 (1918); see also *Ex parte Quirin*, 317 U.S. 1, 25-26 (1942). The power of Congress to classify and conscript manpower for military service is "beyond question." *Lichter* v. *United States*, *supra*, at 756; *Selective Draft Law Cases*, *supra*.[4]

There is no occasion for reconsideration of these established principles at this late date.

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[3] As that opinion points out, the compulsory draft was a normal method of raising armies in the United States at the time the Constitution was adopted; it was expressly recognized in many constitutions of the several States; and was enforced by the States for local purposes in calling out the militia and also for obtaining levies to fill up the ranks of the Continental Army. See *Selective Draft Law Cases*, *supra*, 245 U.S. at 380-381, and the government brief in that case (pp. 18-22, Nos. 656, 663, *et al.*, October Term, 1917).

[4] See also the cases cited by the court below in support of the statement that the courts have consistently and uniformly "upheld the constitutionality of conscription" (Pet. App. 27).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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